IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.————

C. H. McLAIN, ET AL., *Petitioners*,

v.

E. E. LANCE, ET AL., *Respondents*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals For the Fifth Circuit

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Statement of the Case

Reference is here made to statement in the foregoing petition.

Jurisdiction

This Court has jurisdiction under Title 28, U. S. CODE, Section 347 (JUDICIAL CODE, Sec. 240), for the reasons set forth in the foregoing petition for writ of certiorari, to which reference is here made.

Specification of Errors

I.

The Circuit Court of Appeals erred in holding that this controversy involves only a construction of Texas statutes.

II.

The Circuit Court of Appeals erred in holding that this controversy involves no vessel, no contract, no tort, and calls for no declaration of the law of the sea.

III.

The Circuit Court of Appeals erred in affirming the decision of the trial court sustaining Respondents' motion to dismiss the libel on the ground that the Federal Declaratory Judgment Act was not applicable to proceedings in admiralty.

IV.

The Circuit Court of Appeals erred in failing to decide the question as to whether or not the Federal Declaratory Judgment Act is applicable to proceedings in admiralty.

V.

The Circuit Court of Appeals erred in failing to decide the question as to whether or not this controversy states a maritime cause of action.

VI.

The Circuit Court of Appeals erred in holding that the Texas Court of Civil Appeals had settled the law of the case involving the same rights of the identical parties.

Argument

In support of the foregoing Specification of Errors we submit argument directed to the following points:

(1) Federal Statutes, Title 50, U. S. Code, Sections 191, 191(a), and 191(c) and regulations issued pursuant thereto, and not statutes of the State of Texas, control the issues involved in this controversy.

Authorities

50 U. S. Code, Sec. 191(a), (6) and (c);
Executive Order No. 9083, 7 Fed. Register 1609.

The Circuit Court of Appeals held that this controversy is one solely between groups of rival pilots and involves a construction of Texas statutes prescribing the authority of pilots as instrumentalities of the State government.

Such a holding is incorrect.

50 U. S. CODE, Section 191, authorizes the Secretary of the Treasury to make rules and regulations governing the anchorage and movement of all vessels in the territorial waters of the United States, and further, if necessary, to take possession and control of such vessels and remove therefrom the officers and crew thereof and all other persons not authorized by him to go on board thereof.

Section 191(a) transfers the powers of the Secretary of the Treasury to the Secretary of the Navy during time of war.

Section 191(c) requires the Coast Guard District Commander, or one designated by him, to so control the anchorage and movement of vessels in the territorial waters of the United States as to secure the safety of such vessels as may be present in his jurisdiction.

Pursuant to these statutes of the United States and the

proper executive orders and regulations issued thereunder, the control of anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States has been taken over by the United States Coast Guard for the duration of the present war. Proper rules and regulations for the pilotage of such vessels have been promulgated, and actual direction, control, anchorage, pilotage and safekeeping of said vessels is under the immediate direction of an officer of the Coast Guard assigned to a particular area.

All during the present war, and particularly since February 28, 1942, the United States Coast Guard, acting by and through its duly commissioned officers, has arranged for and supervised the procurement of pilots for "refuge ships" and other ships coming into the territorial waters of the United States, and particularly the territorial waters of Bolivar Roads, Galveston Bay, and adjacent waters. As a part of this supervision the said Coast Guard found that there was submarine activity in the Gulf of Mexico near the sea buoy, as shown on Petitioners' Exhibit "A" to their libel (R. 15), and therefore one of its regulations, orders or directions was that all ships were to be boarded at 10 knots.

In addition to the regulation of the movement of vessels, the furnishing of pilots, and the safe anchorage of all vessels of the kind and class known as "refuge ships," the United States Coast Guard deemed it wise and did bring about the induction of all pilots into the United States Coast Guard Reserve about January 22, 1942. Although commissioned in the Coast Guard Reserve, all pilots continued to receive their regular pilotage fees for pilotage rendered.

It is manifest from the foregoing that Texas statutes are by no means the only laws involved in this controversy. To the contrary, the vital issue is whether or not the Federal statutes and regulations issued thereunder supersede State control during the existence of the present war.

Petitioners submit to the Court that Section 191(c) of Title 50, U. S. CODE, is plain and unambiguous, and that it clearly provides that one of the duties of the Coast Guard shall be to control the anchorage and movement of all vessels in the territorial waters of the United States. To effectively comply with the requirements of Section 191(c) it cannot be questioned that the Coast Guard has authority to control the *pilotage* of such vessels. Therefore, clearly, this case does not resolve itself, as the Circuit Court of Appeals has said, into a controversy ultimately involving a construction of Texas statutes prescribing the authority of pilots as instrumentalities of the State government. Under the Federal statutes and the regulations issued thereunder, all of the pilots involved in this controversy became instrumentalities of the Federal Government, having been inducted into the Coast Guard as commissioned officers.

(2) The libel in this action states a maritime cause of action because (a) it seeks to determine rights as to pilotage, (b) it seeks the determination of the existence or construction of an alleged contract maritime in nature.

Authorities

(a)

Hobart v. Drogan, 9 L. Ed. 363, 10 Peters 108;
The Carrie L. Tyler, 106 Fed. 423;
New Jersey Steam Navigation Co. v. Merchants Bank, 6 How. 391, 12 L. Ed. 486;
Ex Parte McNeil, 13 Wall. 243, 20 L. Ed. 626;
Banta v. McNeil, Fed. Case 966;
Ex Parte Haga, 104 U.S. 521, 26 L. Ed. 816;
The Bark Alaska, Fed. Case 129;
Sideracudi v. Mapes, 3 Fed. 876;
Paragraph 99, page 165, Benedict on Admiralty (5th Ed.).

(b)

Paragraph 191, U. S. Code, Title 50;
Executive Order No. 9083, Feb. 28, 1942, 7 Fed. Reg., page 1609;
McDonald v. The Tom Lysle, 48 Fed. 690;
Lawless v. Meynier, 60 Fed. 445;
Clark v. The Ruth, 39 Fed. 128;
Reardon v. Arkell, 59 Fed. 624;
Love v. Hinckley, Fed. Case 8548;
McDonald v. Prioleau, 44 Fed. 769;
James Richardson & Sons v. Conners Marine Co., Inc., 141 Fed. (2d) No. 2, May 1, 1944, at page 226, Advance Sheet;
North Pacific Steamship Co. v. Hall Brothers Marine Railway, 63 L. Ed. 510, 249 U.S. 119.

The cause of action asserted herein is essentially maritime. The United States courts have held, since the vesting of these courts with admiralty jurisdiction, that a suit for pilotage, whether arising from contract or by presumption of law, is properly determinable in admiralty. Section (a) of authorities heretofore cited. It becomes manifest then that a determination of the rights of a pilot to pilotage fees is one which is essentially admiralty and maritime in nature. No case in any Federal Reporter can be found which would hold that a suit for the recovery of such pilot fees, either in rem or in personam, would be denied the jurisdiction of the Federal court by virtue of the nature of the action.

As alleged in the libel, Respondents are contending and now contend that they have a contract with Petitioners for the pilotage of all vessels into Bolivar Roads and the vessels covered by this action of Petitioners. The Petitioners on the other hand contend that there is no such contract, but, in the alternative, if such a contract did exist, that that contract is no longer in force and effect because of Para-

graphs 191, 191(a) and 191(c) of Title 50, U.S. CODE, and Executive Order No. 9083, 7 FED. REG., p. 1609.

Obviously the contract denied by Petitioners, yet urged upon them by Respondents, is a contract within the admiralty and maritime jurisdiction of the District Courts of the United States.

The true test to determine whether or not a contract is of a maritime nature is excellently set out in the case of NORTH PACIFIC STEAMSHIP CO. v. HALL BROTHERS MARINE RAILWAY & SHIPBUILDING CO., supra. It is the same test that all of the courts of the United States now approve, and it, therefore, is the settled law in an admiralty court of the United States. Quoting from the just heretofore cited case, the following pertinent statement is made:

> "It must be taken to be the settled law of this court that while the civil jurisdiction of the admiralty in matters of tort depends upon locality,—whether the act was committed upon navigable waters,—in matters of contract it depends upon the subject matter, nature and character of the contract * * * ; *the true criterion being the nature of the contract, as to whether it have reference to maritime service or maritime transactions.*"

From the foregoing it may easily be seen that the contract referred to in Petitioners' libel, if any such contract exists, is a contract in reference "to maritime service."

In a most recent case in the Second Circuit, JAMES RICHARDSON & SONS v. CONNERS MARINE COMPANY, INC., 141 Fed. (2d) 226, the court makes the following statement:

> "It has been settled that the criterion of admiralty jurisdiction as to contracts is whether the contract is maritime, 'having reference to maritime service or maritime transactions.'"

Obviously, here, such a contract as contended for is a contract plainly in reference to maritime service and is a maritime transaction.

(3) The Federal Declaratory Judgment Act is applicable to proceedings in admiralty, (a) it applies to "the courts of the United States," (b) it is plain and unambiguous and is to be applied, not interpreted or construed, (c) it is sui generis and the right to relief thereunder is not limited or affected by the Federal Rules of Civil Procedure.

Authorities

Paragraph 400, Title 28, U. S. Code;
Paragraph 901, Title 33, U. S. Code;
Borchard Declaratory Judgments (1st Ed.), page 336;
Borchard Declaratory Judgments (2nd Ed.), page 960;
The City of Edinburgh (in Admiralty), Eng. Probate Rep. 1921, page 70;
The Vigilant (in Admiralty), Eng. Probate Rep. 1921, page 312;
The Bristol City (Admiralty Court of Appeals), Eng. Probate Rep. 1921, page 444;
The Remedial Power of the Admiralty, 43 Yale Law Journal, page 1;
Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 76 L. Ed. 282;
Hartford Accident & Indemnity Co. of Hartford v. Southern Pacific Co., 273 U.S. 207, 71 L. Ed. 612;
Crowell v. Benson, 285 U.S. 22, 76 L. Ed. 598;
Prudential Insurance Co. of America v. Goldstein, 43 Fed. Supp. 768;
Securities and Exchange Commission v. Starmont, 31 Fed. Supp. 264;
Streckfus Steamers, Inc., v. Mayor, 81 F. (2d) 298;
Morrison-Knudsen Co., Inc., v. State Board of Equalization, 35 Fed. Supp. 553;

Ohio Casualty & Ins. Co. v. Maloney, 44 Fed. Supp. 312;
21 Virginia Law Review 35, Borchard, The Federal Declaratory Judgment Act;
Butler v. The Boston and Savannah Steamship Co., 130 U.S. 527, 32 L. Ed. 1017;
Providence and New York Steamship Co. v. Hill Manufacturing Co., 109 U.S. 578, 27 L. Ed. 1038, at page 1044;
50 American Jurisprudence, p. 204, Sec. 225;
Caminetti v. U. S., 242 U.S. 470;
Osaka Shosen Kaisha Line v. U. S., 300 U.S. 98, 81 L. Ed. 532, 57 S. Ct. 356;
U. S. v. Standard Brewery, 251 U.S. 210, 64 L. Ed. 229, 40 S. Ct. 139;
U. S. v. Dan Hill, 248 U.S. 420, 63 L. Ed. 337, 39 S. Ct. 143;
Thompson v. U. S., 246 U.S. 547, 62 L. Ed. 876, 38 S. Ct. 349;
Federal Rules of Civil Procedure, Rules 1, 2 and 57;
Act of Congress of June 19, 1934, U.S.C., Secs. 723b and 723c;
Lynn v. U. S., 110 Fed. (2d) 586 (5th C.C.A.).

The Federal Declaratory Judgment Act, Paragraph 400, Title 28, U. S. CODE, is a general act, confined in no manner whatsoever to causes or types of action. The first sentence of the Act makes it applicable to "the courts of the United States, and without restrictive words it is therefore applicable in the courts of the United States and applicable to whatever type of action may be pending before those courts. A history of the statute illustrates the intent and purpose of the Act to be a new tool to bring about through a procedural method proper and adequate remedies of wrongs and the establishment of rights.

The Federal Declaratory Judgment Act is a procedural Act (OHIO CASUALTY AND INSURANCE CO. v. MALONEY, 44 Fed. Supp. 312), and affects in no manner substantive

rights of the parties which must, of course, be adjudged by the particular field of law in which those rights are involved.

Admiralty has been expanding in the utilization of certain tools for the past 150 years, and "the courts of the United States" sitting in admiralty have been quick to take from whatever body of law procedural tools that might be available; those tools to make more expeditious the handling of controversies in admiralty. Many illustrative cases on injunctive relief, garnishment actions, pooling of assets, and other forms of action might be cited here for illustrative purposes; however, in the instant case we are not concerned with court-made law, but have under consideration the utilization of a tool of procedure enacted by Congress. This matter is excellently illustrated under the limitation of liability statute where marshalling of assets were necessary in the HARTFORD case, 273 U.S. 207, and the Court's attention is respectfully directed to that case.

Likewise the Court's attention is particularly directed to the MARINE TRANSIT CORPORATION case, 284 U.S. 263, which case construes the Arbitration Act of February 12, 1925, the Court stating as follows:

> "The question then is one merely as to power of Congress to afford a *remedy* in admiralty to enforce such an obligation."

Passing on to a consideration of the question and to the power of Congress to pass statutes for the enforcement of such obligations, the Court says:

> "The general power of Congress to provide remedies in matters falling within the admiralty jurisdiction of the Federal courts, and to regulate their procedure, is indisputable."

Treating likewise the questions of granting injunctions and specific performance, the Court states as follows:

> "Courts of admiralty may be empowered to grant injunctions, as in proceedings for limitation of liability Similarly, there can be no question of the power of Congress to *authorize specific performance when that is an appropriate remedy in a matter within the admiralty jurisdiction.* As Chief Justice Taney said in The Genesee Chief v. Fitzhugh, 12 How. 443, 460, 13 L. Ed. 1058, 1065: 'The Constitution declares that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction." But it does not direct that the court shall proceed *according to ancient and established forms, or shall adopt any other form or mode of practice.* * * * In admiralty and maritime cases there is no such limitation as to the mode of proceeding; and Congress may therefore in cases of that description *give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice.*' "

In CROWELL v. BENSON, 285 U.S. 22, it was held that such an appeal under the Longshoremen and Harbor Workers Act, was on the admiralty side of the docket and that the fact that the statute of Congress set up a remedy by injunction was immaterial, as Congress could provide the admiralty side of the court with any procedural tool that Congress desired to give to that side of the court. The court points out that the remedy is purely procedural, and that Congress has "the general authority * * * to alter or revise the maritime law." The court likewise states that in view of this Federal power "there appears to be no room for objection on constitutional grounds * * * ."

The generality of the Federal Declaratory Judgment Act

makes quite pertinent the remarks of CHIEF JUSTICE HUGHES in CROWELL v. BENSON as to the ability of the admiralty court to carry out this new procedural tool. CHIEF JUSTICE HUGHES states:

> "The reservation of legal questions is to the same court that has jurisdiction in admiralty, and the mere fact that the court is not described as such is unimportant. Nor is the provision for injunction proceedings open to objection. The Congress was at liberty to draw upon another system of procedure to equip the court with suitable and adequate means for enforcing the standards of the maritime law as defined by the Act. The Genesee Chief v. Fitzhugh, 12 How. 443, 459, 460, 13 L. Ed. 1058, 1065, 1066. Compare Panama R. Co. v. Johnson, supra (264 U.S., p. 388, 68 L. Ed. 753, 44 S. Ct. 391). By statute and rules, courts of admiralty may be empowered to grant injunctions, as in the case of limitation of liability proceedings. Hartford Acci. & Indem. Co. v. Southern P. Co., 273 U.S. 207, 218, 71 L. Ed. 612, 616, 47 S. Ct. 357. See also Marine Transit Corp. v. Dreyfus, 284 U.S. 263, ante, 282, 52 S. Ct. 166. The Congress did not attempt to define questions of law, and the generality of the description leaves no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court has held to fall within that category. There is thus no attempt to interfere with, but rather provision is made to facilitate, the exercise by the court of its jurisdiction to deny effect to any administrative finding which is without evidence, or 'contrary to the indisputable character of the evidence,' or where the hearing is 'inadequate,' or 'unfair,' or arbitrary in any respect."

Likewise citing THE GENESEE CHIEF, CHIEF JUSTICE HUGHES again states as follows:

> " 'The power of Congress to change the mode of pro-

ceeding in this respect in its courts of admiralty, will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. *In admiralty and maritime cases there is no such limitation as to the mode of proceedings, and Congress may therefore in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice.'* "

Hence here there is a new procedural tool for general application which applies to all of "the courts of the United States," those courts being the courts that exercise the admiralty and maritime jurisdiction, and the Federal Declaratory Judgment Act may have great utilization in such courts where the action is in personam.

Of course the Federal Declaratory Judgment Act was first passed in the United States as applicable to the Federal Courts in 1934. Apparently so far there is no recorded decision on the applicability of that act to "the courts of the United States" when exercising their admiralty arm. In STRECKFUS STEAMERS, INC., v. MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, 81 Fed. (2d) 298, JUDGE SIBLEY stated as follows:

> " * * * it is at least doubtful whether courts of admiralty are within the new act. But we are excused from deciding that question, as well as the question whether it applies to suits pending at its passage, by libelant's express disclaimer of any appeal to that act and by his resting the case upon the prayer for injunction."

An examination of the briefs filed in the case referred to by JUDGE SIBLEY shows, on pages 66 and 67 of appellant's brief, that no declaratory relief is sought. On page 5 of appellees' brief it is clearly shown that declaratory relief is not before the court. Hence JUDGE SIBLEY's statement is not decisive of the question here. However, the briefer finds ample authority for the exercise of the declaratory judgment in admiralty actions. The three English cases cited are the latest authority that a declaration under the English Declaratory Judgment Act may apply in admiralty, and the particular cases cited are limitation of liability cases.

Limitation of liability cases illustrate that limited liability particularly springs from the general maritime law. See the case of BUTLER v. THE BOSTON AND SAVANNAH STEAMSHIP CO., 130 U.S. 527, 32 L. Ed. 1017, wherein the following cogent statement is made.

> "The rule of limited liability prescribed by the Act of 1851 (the Act of Congress which permitted the establishment of limited liability in maritime cases in the United States) is nothing more than the old maritime rule, administered in courts of admiralty in all countries except England, from time immemorial; and if this were not so, the subject matter itself is one that belongs to the department of maritime law."

PROFESSOR EDWIN BORCHARD, the author of "DECLARATORY JUDGMENTS," at the pages cited under the list of authorities, states that the Declaratory Judgment Act is ap-

plicable in limitation of liability matters, and cites the English cases heretofore set out. Therefore, while this is a case of the first instance under the Federal Declaratory Judgment Act, it seems apparent from statutory construction heretofore given that such act is all-inclusive, applies to all "the courts of the United States," and therefore when those courts are exercising their admiralty jurisdiction, such act will and does apply to them. Certainly the expressions in CROWELL v. BENSON and in the other cases heretofore mentioned show the forward and progressive attitude of our American courts. Stanley Morrison, Professor of Law at Stanford University, writing in the YALE LAW JOURNAL, makes the following pertinent comment:

> "Certainly the attitude of the Supreme Court makes it apparent that so long as no more is involved than the matter of *remedies* Congress may alter or enlarge the powers of the admiralty as it sees fit."

Therefore, it seems apparent that the Federal Declaratory Judgment Act applies to "the courts of the United States," and therefore to such actions as are admiralty and maritime in their nature when that court is exercising its admiralty arm

An interesting article by PROFESSOR BORCHARD in 21 VIRGINIA LAW REVIEW 35, contains this splendid statement:

> "Declaratory relief is neither legal nor equitable, but *sui generis*. It has the advantage of escaping the technicalities associated with equitable and extraordinary remedies, thus enabling the *substantive goal* to be reached in the *speediest* and most inexpensive form."

This statement is cited with approval by the Third Circuit Court of Appeals in the case of U. S. FIDELITY & GUARANTY CO. v. KOCH, 102 Fed. (2d) 288, where it is stated "Pro-

fessor Borchard, the 'father' of the declaratory judgment in the United States, correctly, as we think, maintains: 'Declaratory relief is neither legal nor equitable, but sui generis.' "

PACIFIC INDEMNITY CO. v. MCDONALD, 107 Fed. (2d) 446 (C.C.A. 9th), likewise cites BORCHARD, and states that the nature of an action for declaratory relief is neither legal nor equitable, but sui generis.

(4) An opinion of the Court of Civil Appeals of Texas on an interlocutory order, such as the sustaining or denial of a plea of privilege, is not res judicata on the principal issues in the case.

Authorities

20 Texas Law Review, page 770;
Lewis v. Davis (C.C.A.), 236 S.W. 105;
Watson Co. v. Cobb Grain Co., 292 S.W. 174;
Jones v. Bledsoe, 293 S.W. 204;
Scott v. Clark, 38 S.W. (2d) 384;
Corbett v. Rankin Independent School Dist., 100 S.W. (2d) 113;
Stafford v. Powell, 148 S.W. (2d) 965;
Williams v. Jackson, 159 S.W. (2d) 99;
Hunt v. Seeley, 115 Fed. (2d) 205.

Argument

The rule has long been well settled in Texas to the effect that a finding in an interlocutory proceeding, for or against the existence or non-existence of a fact which is urged as a ground of recovery or as a defense, cannot become res judicata in a trial on the merits. JONES v. BLEDSOE, 293 S.W. 204 (Tex. Civ. App. 1927).

An important question of local law is involved on this

point, and the Circuit Court of Appeals has held in conflict with the decisions of the State courts. The case of JONES v. BLEDSOE, supra, has the following pertinent statement:

> "'A judgment cannot be set up as a bar of a subsequent action, unless it was a final judgment on the merits, adjudging the rights in litigation in a conclusive and definitive manner. In order that a judgment should be final within the meaning of the rule just stated, it must be such as puts an end to the particular litigation or definitely puts the case out of court, otherwise it is merely interlocutory and constitutes no bar to a subsequent action. The estoppel, however, does not depend on the form of the judgment, but upon its nature and effect.' 34 C. J., p. 770."

Hence the Circuit Court of Appeals has erred in its decision of a point which constitutes the very foundation of that Court's opinion and is the entire basis for the decision of the other issues involved.

For the reasons before stated, Petitioners earnestly urge that this Court grant its writ of certiorari directed to the Circuit Court of Appeals for the Fifth Circuit and relieve Petitioners from the unjust burden to which they are subjected by the terms of the judgment entered against them by said court.

Conclusion

It is respectfully submitted that the writ of certiorari prayed for in the petition should issue.

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